

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

James Lee Troxler,)
)
)
Petitioner,)
)
)
v.) 1:06CV109
)
)
State of North Carolina,)
)
)
Respondent.)

**ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

Petitioner, a prisoner of the State of North Carolina, has submitted a petition under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody. The Clerk of Court received the submission on February 1, 2006, which petitioner had dated as of January 30, 2006. For the following reasons, the petition cannot be further processed.

1. Filing fee was not received or affidavit to proceed in forma pauperis was not submitted or signed by the petitioner. [Attached instructions and Rule 3(a), Rules Governing § 2254 Cases.]
2. An insufficient number of copies was furnished. Petitioner must submit the original and two copies. [Attached instructions and Rule 3(a), Rules Governing § 2254 Cases.] All three sets of forms and exhibits must be identical. Petitioner failed to submit the required copies of his exhibits. He is advised that the respondent usually submits all of the state court record, therefore he need not submit the documents included in his state court record. Also, he should name his custodian, the Secretary of the DOC or his prison superintendent, as the respondent rather than the state.

Because of these pleading failures, this particular petition should be filed and then dismissed, without prejudice to petitioner filing a new petition on the proper habeas corpus forms with the \$5.00 filing fee, or a completed application to proceed in forma pauperis, and otherwise correcting the defects noted. The Court has no authority to toll the statute of limitation, therefore it continues to run, and petitioner must act quickly if he wishes to pursue

this petition. See Spencer v. Sutton, 239 F.3d 626 (4th Cir. 2001). To further aid petitioner, the Clerk is instructed to send petitioner a new application to proceed in forma pauperis, and new § 2254 forms.

In forma pauperis status will be granted for the sole purpose of entering this order of dismissal with permission to file a new petition which corrects the defects of the present petition.

IT IS THEREFORE ORDERED that in forma pauperis status is granted for the sole purpose of entering this order. The Clerk is instructed to send petitioner Section 2254 forms, instructions, and a current application to proceed in forma pauperis.

IT IS RECOMMENDED that this action be filed, but then dismissed sua sponte without prejudice to petitioner filing a new petition which corrects the defects of the current petition.



Wallace W. Dixon, U.S. Magistrate Judge

February 2, 2006